CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

October Term, 1949

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No. 241

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KOUTSKY-BRENNAN-VANA COMPANY, a Corporation,
Petitioner,

vs.

DANEBO LUMBER COMPANY, INC., a Corporation, and MARK C. STORMS, Individually,
Respondents.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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Law Briefs — OMAHA LINO-SLUG PRINTING CO. — 418 So. 15th St.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Your petitioner, Koutsky-Brennan-Vana Company, a corporation, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled cause on May 17, 1950.

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OPINIONS BELOW

The finding of facts and conclusions of law are found on page 39 of the Record. The decree or judgment of the District Court is found on pages 40 and 41 of the Record.

The opinion of the United States Court of Appeals, Ninth Circuit, is found beginning on page 159 of the Record. Judgment is found on page 177 of the Record.

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JURISDICTION

The judgment of the Court of Appeals was entered on May 17, 1950 (R. 177). The jurisdiction of this Court is invoked under 28 U. S. Code, Sec. 1254 (1).

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QUESTIONS PRESENTED

It is the contention of the petitioner that it was in the retail lumber business in the city of Omaha, Douglas County, Nebraska, and was unable to get lumber from the wholesalers or from the mills at what was then the O. P. A. ceiling price. That they were compelled in order to do business at all as a going concern to agree to pay more than the ceiling price in order to get lumber.

That the respondent, Charles M. Kincaide, Jr., was a wholesaler engaged in the selling of lumber wholesale and was also a mill representative and held himself out as representing certain mills which were engaged in the manufacture of lumber. That he and respondent Mark C. Storms had entered into a tentative plan whereby they were to try to get retail lumber companies like petitioner to advance money for the purpose of getting lumber, and

that pursuant to said tentative agreement said Kincaide, representing himself and acting as agent for Mark C. Storms' interest, came to Omaha and contacted the petitioner and other retail lumber dealers in Nebraska and elsewhere, and the said Kincaide and the petitioner, represented by Mr. George Vana, entered into an agreement whereby said Vana was to advance the sum of $15,000.00 for the purpose of getting lumber over the ceiling price and under said agreement said lumber when sold or purchased was to be invoiced at the then prevailing O. P. A. ceiling price, but that there should be added to that the sum of $10.00 to $12.00 per 1,000 feet of lumber, said excess to be taken out of said money advanced until said advanced payment was exhausted.

That it was further part of said agreement that in the event the O. P. A. should go off then the lumber should be furnished at the then prevailing market price as established by the *Weyerhauser* interests and the *Long-Bell Lumber Company* interests, and the lumber should be invoiced at $10.00 to $12.00 under the market price, and the additional $10.00 to $12.00 per 1,000 feet should be deducted from the moneys advanced until said money should be used up.

In the event that the advanced payments were not all used up in this matter the remainder of said advance payments should be refunded to the petitioner. That this was a common scheme or plan devised by respondent to evade the O. P. A. regulations. That the same plan had been previously used in similar transactions. That the sum of $15,000.00 was advanced on this agreement, but no lumber was ever delivered, although repeated demands were made therefor. That as part of said scheme to evade the O. P. A. regulations an option agreement was

to be given to petitioner to purchase stock, but the name of the mill was not given, and the amount advanced was purported to be the payment for said option, but that this was not to be enforced; that it was a sham contract devised by the respondent, Mark C. Storms, and Charles M. Kincaide, Jr., for the purpose of covering up the illegality of the transaction under the O. P. A. regulations and was never to be exercised. That the lumber was to be delivered within 90 days of said payment of said money and these payments were advanced by check by the petitioner in the sum of $15,000.00 on July 20, 1946.

That this petitioner brought this action to rescind and cancel said so-called agreement and is asking that the money be refunded to it on the theory that this is purely an executory contract as far as petitioner is concerned. No dealings or agreements were had directly between the petitioner and the Danebo Lumber Company, Inc., nor Mark C. Storms, and whatever dealings or agreements were made between the parties were handled by Charles M. Kincaide, Jr.

The respondents, Danebo Lumber Company, Mark C. Storms and Charles M. Kincaide, Jr., contended that the petitioner is not entitled to recover under the allegations of its complaint for the reason (1) that the whole transaction as alleged and upon which the plaintiff relies was and is for the purpose of procuring lumber at prices in excess of the ceiling established by the Office of Price Administration and for that reason illegal or unlawful; (2) that the petitioner at the time of entering into the arrangement or agreement upon which the cause of action is based knew that said agreement or arrangement was illegal, in violation of law, and it was done with a delib-

erate and considered purpose. Therefore, the petitioner is not in court with clean hands and is not entitled to any relief whatsoever.

The respondent further contended that under the petitioner's complaint the parties are in pari delicto and for that reason none of the parties have a standing in a court of equity or a court of law.

Petitioner herein contends that under such circumstances, when the proof shows that the agreement, although illegal, is still executory, and is not "malum per se" but only "malum prohibitum," and the money is paid down on such an agreement, that the party paying down the money may bring an action, as this was brought, and set up the illegal agreement and recover the money from the persons to whom it was paid, or who received it under said illegal agreement upon the following theories:

(1) On the theory that the petitioner, which was a retail lumber dealer, was not in pari delicto with the wholesaler or mills, respondent herein, in that it was willing to deal, if possible, under O. P. A. regulations, but that the respondent refused to furnish lumber at O. P. A. prices and therefore, the parties not being equally guilty, the Court will aid the one less guilty in recovering his money back and cancelling the contract.

(2) That even though the Court should find that the parties are equally guilty but still the transaction is not malum per se but only malum prohibitum and the contract is still executory, the party to the contract who pays the money under said illegal contract has the right to go into equity and cancel or rescind the contract and

recover the money paid, on the theory that while the contract is illegal public policy is better conserved by allowing recovery of the money than by permitting the other party to retain an unjust enrichment, and in restoring the money paid down thus prevent the carrying out of the illegal transaction. *Spring Co. vs. Knowlton,* 103 U. S. 49; *Block vs. Darling,* 140 U. S. 234.

(3) A recovery can be had for money had and received where the illegality consists, first, in the contract itself and the contract is not executed; in such case there is a locus poenitentiae and deliction is incomplete, and the contract may be rescinded. *Thomas vs. City of Richmond,* 12 Wall. 349; *Spring Co. vs. Knowlton,* 103 U. S. 49. Second, where the law that created the illegality in the transaction was designed for the coercion of one party and the protection of the other, or where one party is the principal offender and the other only criminal from a constrained acquiescence in such conduct, there is no parity of deliction at all between the parties and the party so protected by the law or so acting under compulsion may at any time resort to the law for his remedy, though the illegal transaction be completed. *McCullen vs. Hoffman,* 174 U. S. 639 (655).

(4) Where the law violated is calculated for the protection of the subject against oppression, extortion, and the defendant takes advantage of the plaintiff's *condition* or *situation,* then the plaintiff shall recover. This includes what is known as economic coercion or duress. *Ring vs. Spina,* 148 F. (2d) 647; 12 Am. Jur., Sec. 219, p. 736; *National Bank & S. Co. vs. Petrie,* 189 U. S. 423.

(5) The right to rescind and recover money paid on illegal contract exists so long as the illegal part of the

bargain is unexecuted. American Law Institute, Restatement, Vol. 2, Sec. 605; 12 Am. Jur., Sec. 216, p. 732.

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STATUTES INVOLVED

The Emergency Price Control Act of 1942 states its purposes in Section I (a) as follows:

> "(a) It is hereby declared to be in the interest of the National Defense and Security and necessary to the effective prosecution of the present war, and the purposes of the act are to stabilize prices and to prevent speculative, unwarranted and abnormal increases in prices and rents, to eliminate and prevent profiteering, hoarding, manipulation, speculation and other disruptive practice, resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency; to assure trial defense appropriations are not dissipated by excessive prices; to protect persons with relatively fixed and limited incomes, consumers, wage earners, investors and persons dependent on life insurance, annuities and pensions from undue impairment of their standard of living, *to prevent hardships to persons engaged in business,* to schools, to universities and other institutions and to the Federal, state and local governments which would result in abnormal increases in prices, to assist in securing adequate production of commodities and facilities to prevent a post-emergency collapse of values." (R. 167-168.)

Title 50, U. S. C. A., Appendix, Sec. 904 (a):

> "It shall be unlawful regardless of any contract, agreement, lease or other obligation heretofore or hereafter entered into for any person to sell or deliver any commodity or in the course of trade or business to *buy* or *receive* any commodity * * * in violation of any regulation or order under Sec. 2

(902) of this appendix or of any price schedule effective in accordance with the provisions of Sec. 206 (Sec. 926 of this appendix) or of any regulation, order or requirement under Sec. 206 (Sec. 926 of this Appendix) or of any regulation or requirement under Sec. 202 (b) or Sec. 205 (f) (Sections 923 (b) or 925 (f) of this appendix), or to offer, solicit, attempt or *agree* to do any of the foregoing."

That the violation of these provisions are misdemeanors and only are malum prohibitum and not malum per se and involve no moral turpitude, was so held in *Kempe vs. U. S.* (8th Cir.), 151 F. (2d) 680 (688), cert. denied 331 U. S. 843, 91 L. Ed. 1854, 67 S. C. R. 1534; *Blumenthal vs. U. S.*, 332 U. S. 539 (560, 561), 92 L. Ed. 154, Syl. 7.

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STATEMENT

Under these pleadings and issues a trial was had before the Honorable Claude McColloch. It was agreed by all the parties that petitioner issued its check to the respondent, Mark C. Storms, dated July 20, 1946, in the amount of $15,000.00, and delivered said check to defendant, Charles M. Kincaide, Jr., and he delivered said check to Mark C. Storms, and he in turn endorsed said check to the respondent, Danebo Lumber Company, and it received the money on the check.

That no lumber shipments were made and no lumber sold by Danebo Lumber Company to petitioner.

That the respondents, Danebo Lumber Company and Mark C. Storms, refused to return said $15,000.00 or any part thereof, although so demanded by the petitioner (R. 15).

It was admitted that Mr. Kincaide early in the year 1946, probably in June, had a conference with Mr. Storms in Eugene and Storms told Kincaide that they were thinking about organizing a corporation to construct and operate a saw mill at Danebo, and they needed additional finances, and they said to him if he could get additional finances along the lines he said he could, namely, through options on stock of the new corporation, they would sell him a certain percentage of the output. Kincaide came to Omaha and in the east and returned, saying he had the money, among which was the $15,000.00 of Vana involved in this controversy (R. 18).

Then the so-called options were drawn up, dated August 29, 1946 (R. 148). Similar deals were made with several other retailers (R. 16 and 17).

All parties agree that all the dealings were between Kincaide as a wholesaler and mill representative and the various retail lumber firms.

At the close of the hearing the Court immediately announced his holding, as follows:

> "My holding will be this—I will amplify these findings at an appropriate time. This was a conspiracy which all the parties engaged in, the buyers and the sellers, to violate the Price Control Act, and appropriate regulations thereunder, and I feel under the circumstances of the case that the plaintiff is entitled to recover against the lumber company defendant and against Storms, defendant. As to that I will file a written memorandum later, but generally speaking, it is on the theory of money had and received, and unjust enrichment both of Storms and the lumber company, so I hold them as defendants, and by the converse I do not hold the defendant, Kincaide." (R. 143.)

"Findings of Fact

"Supplementing the brief statement which I made at the end of the trial, I find that plaintiff and defendants and others were engaged in a conspiracy to violate the Emergency Price Control Act of 1942, as amended, and the regulations thereunder, and that the sum sued for herein was paid by plaintiff through the medium of defendant Kincaide, to defendant Storms, and by the latter to the Danebo Lumber Company, in furtherance of and as one of the overt acts." (R. 160.)

Judgment was rendered December 3, 1948, in favor of plaintiff against defendants, Danebo Lumber Company and Mark C. Storms, with interest at the rate of 6 per cent per annum from September 23, 1948.

The Court of Appeals reversed this judgment May 17, 1950, opinion by Chief Justice Denman; McCormick, District Judge, concurring in result.

The Court of Appeals completely reversed the case and held that the agreement was an attempt to evade the O. P. A. and the regulations issued pursuant thereto.

That the contract was *executed* and not executory.

That the transaction was a *felonious* conspiracy to defraud the United States; that the black-marketing of lumber is sought to be concealed by deceiving the O. P. A. officers in the performance of their duties.

That it was further a conspiracy to commit the crime of violating Section 4 (a) of the Price Control Act prohibiting agreements or *solicitations* to sell at prices in excess of the O. P. A. maximum, for which the penalty under Section 205 (b) of the Act is a fine of $5,000.00 and a year's imprisonment.

The Court held that equity would not lend its power to Vana, a party to a contract in which it had paid the full consideration to Danebo and known by it to be malum per se, executed in a criminal conspiracy to violate a federal law to prevent excessive prices caused by war shortage, to rescind the contract and to restore to Vana's unclean hands the money given to Danebo as consideration for its joining in the contract's execution (R. 167).

Citing numerous cases which the opinion claims supports their decision, and sought to distinguish cases which we cited—several of them decisions of the United States Supreme Court.

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SPECIFICATIONS OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In holding that the contract, as far as the illegal part thereof was concerned, was fully executed, was felonious and criminal in character, was malum per se and not malum prohibitum, and therefore rescission would not lie, and a Court of equity would not aid Vana in recovering his money back.

2. In not holding that where the illegal contract was not malum per se, but only malum prohibitum, and where the only part of the carrying out of the contract was the payment of part of the consideration, and nothing was done by the other party, such a contract was still executory, and even though parties were in pari delicto equity would allow rescission, cancel the contract, and restore the consideration on the theory that public policy is better conserved by allowing rescission before the illegal part of the agreement is carried out, as held by this Court in

Spring Co. v. Knowlton, 103 U. S. 49, and numerous cases following that decision; also *Kempe vs. U. S.* (8th Cir.), 151 F. (2d) 680 (688).

3. In not enforcing the rule that there can be different measures of guilt, and that this case shows that the retailers desired to comply with the O. P. A. Act and its regulations, but on account of inability to obtain lumber from wholesalers and mills without paying over-ceiling prices, and as they desired to remain in business and maintain their overhead, they were compelled to agree to some method of obtaining lumber over ceiling, and that where there is such economic duress the Court will allow them to rescind and recover their money back where the contract is executory, as held in *Ring vs. Spina*, 148 F. (2d) 647.

4. In holding that Vana and the other retailers *solicited* the entry into the so-called illegal agreements, when the uncontradicted evidence showed that all the retailers both in the Danebo deal and in the Furrow deal were anxious to get lumber at retail prices. That it was no advantage to them to pay over ceiling prices, because they would have to absorb the overcharge or as suggested by the Court, add the additional cost to the consumer and violate another provision of the Price Control Act.

5. In holding that when Vana advanced the $15,000.00 on July 17, 1946, the illegal part of the agreement was *executed*, because at that time the Court will take judicial notice, that the old Act expired, according to its terms, June 30, 1946, and the new Act did not become effective until July 27, 1946, and the *criminal provisions*

of the new Act could not relate back to what was done before it became a law as this would make an act criminal that was not so when done, and would be unconstitutional as an ex post facto law.

6. In holding that what Vana did was felonious as he did not buy any lumber while the OPA was in force nor afterward nor did he agree to buy or solicit the buying while OPA was in force. See *Kempe v. U. S.* (8 Cir.), 151 Fed. 680 (688).

7. In holding that Vana when he paid the $15,000.00 this amounted to an execution of the illegal part of the agreement because if that were so, then there never could be a time when the repentance rule announced in the *Spring Co. v. Knowlton* case in 103 U. S. 49 and in *Thomas v. Wallace,* 12 Wall. 349, referred to in the Danebo opinion as an exception to the general rule that equity will not aid a party to an illegal contract.

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REASONS FOR GRANTING THE WRIT

1. The decision of the Court is directly in contradiction to the repentance rule in the *Spring Co. v. Knowlton* case in the 103 U. S. 49, and numerous Supreme Court decisions of the United States following said case defining Malum Per Se and Malum Prohibitum, and the exception recognized in *Thomas vs. City of Richmond,* 12 Wall. (U. S.) 349. All the cases cited in the opinion save one, are cases where the contract was fully executed or was one seeking to enforce an illegal contract, and all recognized the distinction made in the Knowlton case. This Court should settle what is meant by Malum in Se and Moral Turpitude, and when is a contract ex-

ecutory, as referred to in the case of *Spring Co. vs. Knowlton,* 103 U. S. 49, and *Kempe vs. U. S.,* 151 Fed. 680 (688) (8 Cir.), cert. denied 331 U. S. 843.

2. The Court refused to recognize that there is such a thing as economic coercion, that the act according to its terms was designed as shown by the quotation (R. 7) of the opinion (among numerous other reasons) *to prevent hardships to persons engaged in business,* and on this point is in direct conflict with the case cited in our brief in the Furrow case, that of *Ring v. Spina,* 148 Fed. (2d) 647, so that this lack of harmony should be settled by this Court as to whether economic coercion is a ground for rescission of a contract illegally entered into on that account.

3. Clearly the questions presented are of general importance so as to call for this Court supervision of conflicting Court of Appeals decisions as referred to in Rule 38 (b), and has decided an important question of law as to what is meant by the expression Malum in Se, Malum Prohibitum, and moral turpitude, and has decided a federal question probably in conflict with the leading case of *Spring vs. Knowlton,* and numerous cases following the rule there announced, also recognized as an exception to the general rule in *Thomas vs. City of Richmond,* 12 Wall. 349, and other cases cited as authority in the Court's opinion.

Settlement of the questions here involved is plainly in the public interest since these cases are cases of first impression under these OPA regulations, and there are now pending other cases involving the same common facts, and law in the states of Oregon and Iowa on stipu-

lation abiding the outcome of these two suits, and if there is, as suggested by the Court in its opinion the possibility of another war, and if so similar regulations to the OPA then the liabilities of the parties should be settled by this Court.

This Court should definitely settle the question as to whether before the illegal part of such an agreement as is here presented, is actually carried out this Court will allow a rescission of the contract and a recovery of the money paid down on the theory that public policy is better preserved by thus preventing the carrying out of the illegal transaction, thus enforcing the unjust enrichment sale, and at the same time in a better way carry out the public policy of the Government.

For these reasons this Petition for Certiorari should be granted.

Respectfully submitted,

S. L. WINTERS,
Counsel for Petitioner.

BRIEF AND ARGUMENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

We deem it unnecessary to repeat in our Argument here all the Assignments or reasons given above for granting the Petition for Writ of Certiorari, as it will just result in duplication and unduly prolong this Petition.

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ARGUMENT

As stated in the Court of Appeals' opinion both cases involve similar facts and law and the opinions supplement each other, and therefore, what is said here with reference to one case is applicable also to the other, and therefore, need not be repeated in each case, except that in the Danebo case no specific findings were made as to whether or not the parties were in pari delicto, nor as to whether or not there is such a thing as economic coercion or duress.

Judge McColloch in his case based his decision upon the broad principle that while all parties intended to evade the price control act and the regulations pursuant thereto, Storms and Danebo got the retailers' money, never furnished any lumber thereunder, and applying the rule of unjust enrichment they would not have the right to keep the money and rendered judgment against Storms and Danebo for the full amount retained.

The Court orally announced from the bench that they received the retailers' money, and did not deliver any lumber, therefore, under the above rule would not have the right to keep the money.

In the Furrow case District Judge Bowen held specifically, that the parties were not in pari delicto, that the retailers' hands were comparatively clean compared to Furrow, and they were under economic coercion or duress, and were, therefore, entitled to rescind and recover their money back.

The Court of Appeals in both of these opinions reversed the District Courts and squarely held that these parties were in pari delicto, that they had entered into a *felonious* conspiracy to *defraud the Government* and to evade the OPA Regulations, and that these violations were malum per se and not malum prohibitum, and were executed, and not executory, therefore, not within the repentance rule announced in the case of *Spring v. Knowlton,* 103 U. S. 49, upon which we rely, and the numerous cases in which that same rule was applied throughout the country. That case announced the rule that even if the parties were in pari delicto still as the contract was not malum per se but simply malum prohibitum, that is, simply prohibited by law, and did not involve moral turpitude, that while the contract was executory, save that the money was paid down, but the illegal purpose not carried out, the parties to such an illegal agreement could rescind and recover the money back, on the theory that public policy is better conserved by allowing a rescission by one of the guilty parties rather than to permit the illegal part of the agreement to be carried out, and the purpose of the law frustrated.

It is our contention that the reference in the opinion to the Government being defrauded was not involved in this controversy, because the Government was *not defrauded in any way.*

The Court of Appeals stated in their opinions that the contract as alleged was not proven, but we submit that is contrary to the fact, because all the retailers testified that they wanted to buy lumber at OPA prices, and that it was next to impossible to get lumber at OPA prices because the wholesalers and mills would not sell at OPA prices. Yet the Court said in its opinion that it would take judicial notice that although all the retailers so testified, and the lower Court found that they were under economic duress or coercion and were compelled on account of their investment to buy lumber over OPA prices. Yet the Court said it would take judicial notice that that was not true, and that our contract was not proven.

Our witnesses testified that the scheme advanced by Kincaide on behalf of the defendants was that there was to be a sham option contract, their money was to be advanced on those sham contracts, and the money so advanced was to be used as a fund out of which the excess price over OPA was to be paid, and the balance of the purchase price to be invoiced at OPA ceiling prices while OPA was on, and the excess $10.00 to $12.00 per 1,000 feet was to be taken out of the advanced option payment until the fund was exhausted, and if OPA went off then they were to get lumber at wholesale as evidenced by the Long Bell Lumber Company and the Weyerhauser Company. The lumber, however, was to be invoiced at $10 and $12 below said established market price, and the difference taken out of the funds until the fund was exhausted.

That was the only contract proved at the trial. As the opinions point out Storms claims that the option was a bona fide executed agreement, and that is the only con-

tract he claimed was made, but the Court held against him.

The opinions admit that unlike the Danebo case, Furrow baldly admitted he would not sell at OPA prices. Furrow did not deny the claims of all the retailers that whether the OPA was on or not, the money advanced on the so-called options were to be credited on the price paid for lumber.

In order to get around the so-called repentance rule, the Court of Appeals held that the payment of the money down was a payment for so much lumber and, therefore, the contract was not executory within the Knowlton case rule but was executed.

We submit, however, that could not be true as a matter of law, because if the down payment makes the contract so far executed that it cannot be rescinded then there will never be a time when the repentance rule announced in the Knowlton case could be applied, and there would be no money to recover back. The Knowlton case clearly recognized the rule that if the contract is executed only to the extent that the money is paid down and there is nothing down on the other side, that that part performance will not take it out of the rule allowing rescission and consequent recovery.

All the cases cited in the Court of Appeals opinions are cases where attempts were made either to enforce the illegal contract or to recover the money back after the contract has been fully executed, and in every one of the cases except one the Knowlton rule was admitted and distinguished. The Pullman Palace Car case in the 171

U. S. is recognized and distinguished. Again the Court of Appeals, in order to get out from under the rule announced in the Knowlton case and cases following that case, held that this attempt of Vana and the other retailers was a *felonious conspiracy* to evade OPA regulations and *defraud the United States,* and were *malum per se* and not *malum prohibitum.*

It was unfortunate that the United States Supreme Court in the Knowlton case did not define the meaning of "malum per se" and "malum prohibitum," and did not define the expression there used of "moral turpitude." But it was our contention that it clearly would mean that where the act, as in this case, was just a violation of the statute in paying an over-ceiling price, this did not involve moral turpitude and was not malum per se. That is one of the reasons why we say that case is now of such importance that this Court should define what is meant by the expressions malum per se and malum prohibitum, and what actions do involve moral turpitude.

It is our contention also that these opinions of the Court of Appeals are in direct conflict with other opinions of the Supreme Court of the United States.

For instance in *McCullen v. Hauptman,* 174 U. S. 639 (654), this Court stated:

> "It has been sometimes said that where a contract, although it be illegal, has been fully executed between the parties, so that nothing remains thereof for a completion, money received by him without resorting to the contract, the Court will permit a recovery in such case."

Again, in *Thomas v. City of Richmond,* 12 Wall. 349, approved by the Court of Appeals in those cases, the

Supreme Court recognized the rule that we contend is applicable here, and which was applied in the Knowlton case, on the right to rescind an executory contract, following with approval the English case, 2nd Douglas 696, to the effect that:

> "Even where the parties are in pari delicto, but where the law violated is calculated for the protection of the subject against oppression, extortion and deceit, and the defendant takes advantage of the plaintiff's condition or situation, then the plaintiff shall recover, and a recovery can be had for money had and received where the illegality consists (1) In the contract itself, and that contract is not executed, in such case there is a locus poenitentiae and deliction is incomplete, and the contract may be rescinded. (2) Where the law that created the illegality in the transaction was designed for the coercion of one party and the protection of the other, or where one party is the *principal offender* and the other only criminal, from a constrained acquiescence in such conduct there is no parity of deliction at all between the parties, and the party so protected by the law or so acting under compulsion may at any time resort to the law for his remedy, *though the illegal transaction be completed.*"

These appeals are out of harmony with the case of *National Bank & Loan Co. v. Pettrie*, 189 U. S. 423, where where the Court stated that if the withdrawal from the contract was on the ground of repentance alone, the law might or might not leave the parties where it found it, following the Pullman Palace Car case, 171 U. S., which case follows the Knowlton case in 103 U. S. relied upon by us. But the Court went on to say in the Pettrie case that a person did not become an outlaw or lose all rights by doing an illegal act.

It is our further contention that these opinions in controversy, which squarely hold that Vana and these retailers were guilty of a *felonious conspiracy* to evade the OPA regulations, and were in pari delicto, is clearly and directly opposite to the case of *Kempe v. United States,* 151 F. (2d) 680 (688), 8th Circuit, where the Court squarely held that the violation to the OPA regulations, while criminal offenses are *misdemeanors only,* and not *infamous* crimes within the meaning of the 5th Amendment to the United States Constitution, and could be prosecuted by fine or imprisonment, or both. Following on this point *Falconio v. United States* (6th Circuit), 280 Fed. 766.

Rosini v. United States, 6 Fed. (2d) 350.

Brede v. Powers, 263 U. S. 4, 44 S. C. R. 8.

At page 688 this Kempe case in defining malum in se stated:

> "Federal crimes have been divided according to their nature into crimes malum in se, and malum prohibita, the former comprise those acts which are immoral, or wrong in themselves, such as murder, rape, arson, burglary, larceny, breach of the peace, forgery, and the like, the latter embraces those things which are prohibited by statute, because they infringe on the rights of others although no moral turpitude may attach, and they are crimes only because they are prohibited by statute. Generally crimes malum in se involve moral turpitude, while crimes malum prohibitum do not." Certiorari denied 331 U. S. 843, 91 L. Ed. 1854, 67 S. C. R. 1534.

These cases we contend are directly opposite to the Circuit Court of Appeals' decision in this case, therefore, furnishes another reason why the Petition for Certiorari should be granted.

We submit there is nothing involving moral turpitude in agreeing to buy lumber at a certain price even though that price was over the ceiling price. We further contend that the violation of these acts are not a *felony,* and are, therefore, not *malum in se* as the Court of Appeals decided in these two cases.

In the Danebo case the agreement was entered into when the OPA was off. The OPA expired according to its terms June 30, 1946, and were not restored until July 27, 1946, and it was in the interim that these agreements were entered into in the Danebo case.

In the Danebo case no lumber was ever delivered to anyone. Therefore, the only illegal agreement was that they *agreed* at a time when the OPA was off that they would buy lumber if the OPA went on in excess of the OPA price as they testified.

That these violations are not felonies and not malem in se was also held in effect in the recent case of *Blumenthal v. United States* (Calif.), 332 U. S. 539, 68 S. C. R. 248, 92 L. Ed. 154, rehearing denied 68 S. C. R. 385, 332 U. S. 856, 92 L. Ed. (9th Circuit), where the Court at page 561 of the 332 U. S. stated:

> "That the prosecution under Section 4 (a) under Emergency Price Control Act, 50 U. S. C. A., App. 904 (a) makes it unlawful as a *misdemeanor,* Sec. 205 (b) 50 USCA, Appx. 925 (b) for any person to sell or deliver any commodity in violation of price regulations, or to offer, solicit, attempt or *agree* to do any of the foregoing, and that conviction under this section cannot be had under the general conspiracy statute, which requires more than mere *agreement,* namely, the commission of an overt act." Citing *Taub v. Bowles,* 149 Fed. (2d) 817.

The cases at bar are clearly in direct conflict with these cases just cited, and they seek to hold that this is a *felonious* conspiracy *malem in se,* and are fully *executed* when the money is simply paid down on an illegal contract, and therefore, for that reason it is of general importance that this petition may be granted so that this Court may definitely determine for future guidance what is meant by an executed or an executory contract, malem per se or malem prohibitum.

Again these opinions clearly reverse the lower Court's holding in the Furrow case, in holding that they were not in pari delicto, and they could not get lumber at OPA prices without paying over ceiling prices.

The statute quoted in these opinions wherein the OPA gives the reasons why Congress adopted this act, specifically refers to one of the reasons being to prevent *hardship for persons engaged in trade or business,* and they were, therefore, clearly within the persons to be *protected* by the Emergency Price Control Act. They were *victims* rather than *felonious* conspirators, and were within the class designed to be *protected* as it worked a hardship on them in that they were forced to pay over ceiling prices or *go out of business.*

This rule was recognized by Judge Bowen in his opinion in the lower Court. That there is such a thing as economic coercion or duress which is clearly denied in these opinions is evidenced by the extracts that we gave above in *Thomas v. City of Richmond* and other cases, is also evidenced by the leading case of *Ring v. Spina,* 148 Fed. 647 (8th Circuit), which by the way is directly opposite to the opinions in these cases, and therefore

calls for the granting of a Petition for Certiorari on the ground that they are in direct disharmony. That was a case where the plaintiff sued defendant for treble damages under a contract which he alleged was in violation of the Sherman Anti Trust Act. The defendants claim that plaintiffs were not entitled to relief, because he signed the basic agreement which, among other things, promised any of its members to lease, or license a play; defendant limits contracts by both manager and authors under its own terms, and they must be in good standing with the guild. It appears that plaintiff signed the agreement which was in violation of the Sherman Anti Trust Act. The plaintiff was interested in the protection of a play known as the "Stove Pipe Hat," and he claims he signed this restrictive agreement in violation of the Sherman Anti Trust Act *against his will,* and under *coercive pressure,* and rules and regulations of the guild, in order that he might protect his part in the venture. Then a dispute arose between the parties as the defendant claimed that the plaintiff made changes in the play, which breached the basic agreement above referred to, and they, therefore, terminated his contract. The play was forced to close, and therefore, he sought this injunctive relief. The lower Court denied him any relief, but the Circuit Court reversed this finding, and held, that as the evidence showed that plaintiff had invested considerable money in the production of the play, and that he found it impossible to show the play until he in turn became a member of the guild in good standing by signing the basic agreement. The rules of the guild permitted no other course, thus he had to sign to save his $50,000.00 investment, and to safeguard his future attempts to bring the venture to fruition.

The Circuit Court then states that this seems to us a prima facie showing of *economic coercion.* In discussing this matter the Court said page 652:

> "It is well settled that where one party to an illegal contract acts under the duress of another, the parties are not in pari delicto, and where there is a showing of *economic duress* similar to that asserted here, it has been held sufficient proof that the plaintiff was not a party to the monopoly." Citing numerous cases.

They went further to say:

> "There appears to be a definite tendency to hold those not actively engaged in promoting monopolies to be *victims* rather than participants in the violation."

They went further to say:

> "But here even without a showing of economic coercion as the final step in forcing him to sign the basic agreement, plaintiff is precisely the type of individual whom the Sherman Act seeks to *protect,* and conditions of public policy demand the court's intervention in behalf of such a person even if technically he be considered in pari delicto. Indeed this is a general principle applicable beyond the anti trust field."

These decisions, therefore, at bar are clearly directly opposed by the case of *Ring v. Spina* above cited. That furnishes another reason why the Petition for Certiorari should be granted.

The Knowlton case that we have so repeatedly referred to has this to say with reference to whether you can recover back when you pay the money down:

> "The question presented is, therefore, whether conceding said contract to be illegal money paid by one

of the parties in *part performance* can be recovered, the other party not having performed the contract, or any part thereof, and both parties having *abandoned the illegal agreement before it was consummated.* We think the authorities sustain the affirmative of this proposition."

Here the evidence clearly shows that we come squarely within that doctrine, therefore, the decisions in these cases are in direct conflict with the Knowlton case above cited.

Bowles v. Glick Bros. Lumber Company (Cal.), 9th Circuit, 146 Fed. (2d) 566, was cited with approval in the Court of Appeals' decisions to the effect that parties both the buyers and sellers are in pari delicto, but an examination of that case will show that was dictum only, because whether or not they were in pari delicto the retailers cannot recover under a case like the one involved in the Glick case, which was an action to recover treble damages, not because they were in pari delicto, but because the statute by its *peculiar wording* prohibited those who purchase for *use in their trade or business from* recovering treble damages because they are not within the peculiar wording of the statute as those who buy for use in their trade and business are expressly *excluded* from the act. Even a farmer who buys a tractor in violation of the Emergency Price Control Act cannot recover the treble damages as he buys for use in his trade or business, that of a farmer. That this class cannot recover for treble damages does not prevent them from being within the persons protected under the act, as the act is designed expressly to protect those on which it works a *hardship in their trade or business,* and certainly it works a hardship on these retailers to be com-

pelled to pay more than OPA ceiling prices, and certainly it is no advantage to them to have to do so.

Circuit Court Violated Rule 52 of Federal Rules of Civil Procedure

Again the reversal of the Circuit Court of Appeals of the facts found by the lower Court in the Furrow case was in direct violation of Rule 52 of the Federal Rules of Civil Procedure, which provides as follows:

> "The findings of fact should not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."

Especially is this true where the opinion admits that everyone who testified on that point, testified that it was next to impossible to get lumber withou paying more than OPA prices, and the lower Court so expressly found, and yet these opinions set aside the finding of the lower Court and announce the astounding doctrine, that although every one testified to that, *they will take judicial notice that that was not true.*

That the trial Court's findings of fact should not be set aside or disturbed on appeal unless clearly erroneous is decided, besides numerous other cases, by the following recent decisions:

Dearborn Natl. Gas Co. v. Consumers Petro. Co. (Ill.), 178 Fed. (2d) 277.

Small v. Schultz, 180 Fed. (2d) 351.

Orvis v. Higgans (N. Y.), 180 Fed. (2d) 537.

United States v. Fotopulos (9th Circuit), 180 Fed. (2d) 633.

Moss v. United States, 179 Fed. (2d) 824.

United States ex rel. DeLucia v. O'Donovan, 178 Fed. (2d) 876.

Walker v. United States, 180 Fed. (2d) 217.

These decisions of the Court of Appeals are in direct opposition to the rule announced in *Spring Co. v. Knowlton,* 103 U. S. 49, and numerous cases following that rule. They are in direct violation of the *economic coercion* or *duress rule* found by the lower Court in the Furrow case, and direct opposition to such a rule announced in the *Ring v. Spina* case, and extracts from other Supreme Court decisions referred to in this brief.

It is in direct violation of Rule 52 of the Federal Rules of Civil Procedure which prohibits the reversal of the lower Court, unless the findings of fact are clearly erroneous, and it is in direct violation of the Kempe case, which holds that these regulations are a misdemeanor only, and are not malem per se, and the Supreme Court should clarify these cases, and settle the proposition as to what is meant by malem per se, and malem prohibitum, and moral turpitude.

As pointed out in the opinions there may be another War, and it is of the utmost importance that similar provisions, if they are passed by Congress should have the proper construction, and several cases are still pending in Oregon and Iowa awaiting the result of these cases.

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CONCLUSION

For the foregoing reasons this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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